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AED legal centre

A joint submission from Inclusion Australia and AED Legal Centre in response to an application by the Department of Social Services for an (additional) exemption from the Disability Discrimination Act 1992 to use the Business Services Wage Assessment Tool

For consideration of the

Australian Human Rights Commission

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Legal Section

Australian Human Rights Commission

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Introduction

Inclusion Australia and AED Legal Centre appreciates the opportunity to provide a submission to the Australian Human Rights Commission (Commission) in response to the application by the Commonwealth Department of Social Services seeking a further twelve months exemption from the Disability Discrimination Act 1992 for employees with disability to be paid wages based on the Business Services Wage Assessment Tool (BSWAT).

Inclusion Australia is a national peak body with the single focus on intellectual disability, i.e., our actions and priorities centre on issues that affect the lives of people with intellectual disability and their families. NCID's mission is to work to make the Australian community one in which people with intellectual disability are involved and accepted as equal participating members.

AED Legal Centre provides legal advocacy to people with a disability in the areas of employment, education and training. Our main objective is to protect and advance the rights of people with a disability who experience difficulties and/or discrimination in employment or education because of their disability.

Our Position in Brief

We belief that the Commission should **not grant an exemption** on the follow bases.

- The Commonwealth and ADEs continue to deny that BSWAT is unfair and discriminatory. The application is disingenuous. If BSWAT is fair, why does the Commonwealth require an exemption and deny people with intellectual disability their right to complain under the DDA?
- We are unable to determine what exactly has been achieved after the one year temporary exemption granted on April 29, 2014. The first three quarterly reports provided little specific information on the progress of transition for each ADE and its employees. The fourth quarterly report has yet to be published.

- A further exemption would unnecessarily continue the discrimination in employment of thousands of people with intellectual disability. It is now two and half years since the Full Federal Court decision which found that BSWAT disadvantages workers with intellectual disability as a class of people.
- There already exists a valid productivity based wage assessment tool (i.e. the Supported Wage System — SWS) that is available to ADEs to use. It is currently being used by several ADEs today without risk to viability.
- A new productivity based wage tool still remains contentious. Inclusion Australia, AED Legal Centre, People with Disabilities Australia, and relevant unions (the ACTU, United Voice and Health Services Union) have proposed minor modifications to the Supported Wage System in response to issues raised by ADEs. As a result, some work under the conciliation process of the Fair Work Commission is progressing on this basis. Public statements made by ADE representatives, however, indicate that there is no commitment to adopting a modified SWS across the ADE sector.
- Transition from BSWAT to the SWS or an approved tool has thus far been ***very slow***. DSS and relevant ADEs have failed to meet the conditions of the temporary exemption from April 29 2014. Quarterly reports have failed to provide details on the commitment and progress of each individual ADE. Statements of commitment to change have not resulted in actual change.
- There is no specific and transparent plan of commitment from the Commonwealth setting out how **each** ADE will change to the SWS or an approved tool.
- An application for a temporary exemption from the DDA for ADEs to continue to use existing BSWAT assessments to pay workers should be made by relevant ADEs, not the Commonwealth. It is the ADEs that are the employers making the decision of what wage assessment arrangements they use. As stated by the Commonwealth in their first

quarterly report, “each ADE will make independent decisions about wage assessment arrangements within the industrial relations framework and its business/philosophical requirements”. In the current application, DSS state that, “the Department has no contractual ability to force organisations to change wage tools. This decision is one for individual ADEs taking into account the implications of the exemption and their industrial relations requirements as employers.” The application for a temporary exemption to use the BSWAT should be received from each relevant ADE. An application from the Commonwealth is not relevant as the Commonwealth has no decision making power on how an employee with intellectual disability is paid. It is our view that each ADE, still using BSWAT to pay wages, should individually and transparently report what they have done to meet the conditions of the exemption granted from 29 April 2014; and in applying for a further twelve month exemption, set out what they intend to do to change.

- The Commonwealth and relevant ADEs continue to claim that fair wages are not sustainable and that jobs may be lost or businesses close. This is a claim made without any transparent or valid evidence. Real concerns about viability can be mitigated through Commonwealth budgeted wage supplementation ($141million), and budgeted assistance to achieve business viability ($17million).
- It may be more appropriate for a transition to fair award wages to be addressed via the Fair Work Commission conciliation process. It is expected that a consent variation to the SESA will occur that will remove BSWAT from the Award. This will require ADEs to commit to change within a month and provide six months to change from BSWAT to an approved tool. ADEs needing more time will be required to make an application to the FWC setting out reasons.

Background

On 5th September 2013, the DSS made an application to the Australian Human Rights Commission for a temporary exemption from the Disability Discrimination Act 1992 for three years to continue to use the BSWAT to assess and pay the wages of employees of Australian Disability Enterprises. DSS proposed to use the time to consider, devise, establish and implement alternative wage setting arrangements.

The application was made due to the decision of the Full Federal Court in *Nojin v Commonwealth [2012] FCAFC 192* on 21 December 2012, and affirmed by the High Court of Australia on 10 May 2013 when an application by the Commonwealth to appeal the decision was rejected. The Full Federal Court decision concluded that BSWAT disadvantaged workers with intellectual disability as a class of people.

Inclusion Australia and AED Legal Centre, together with other national disability and advocacy organisations, provided a detailed submission to the Australian Human Rights Commission (Commission) arguing that the DSS application for a temporary exemption be refused. We argued that:

- The Full Federal Court and the High Court found that BSWAT disadvantages workers with intellectual disability
- The Commonwealth and ADEs should stop this discrimination immediately
- A temporary redress be provided by using the productivity part of the BSWAT assessment.
- The Supported Wage System be implemented across all ADE work settings to ensure fair and non-discriminatory wages for workers with intellectual disability.
- The Commonwealth temporarily guarantee the viability of ADEs to protect jobs during this change to fair and non-discriminatory wages

- Develop a national program of effective specialist employment support to give people with intellectual disability the option to work in the open labour market with the right support.

The central point of our submission is that a valid pro-rata award based wage assessment system is already available to ADEs (i.e. the Supported Wage System, (SWS)). There is no need for an exemption to give time to develop a new productivity based wage assessment. The SWS is used successfully in open and supported employment to determine productivity based wages for people with disability who are unable to work at full award wages.

We proposed that the SWS be implemented across the ADE sector as the single national wage assessment tool. This addresses the defect contained in BSWAT, and other competency based wage assessment tools listed in the SES Award.

We also proposed that the Commonwealth provide additional funding to help ADEs meet higher wage costs and adjust business practices to secure the employment of the current workforce.

On 29 April 2014, the Commission decided to grant a one year exemption for the payment of wages to ADE employees based on current BSWAT assessments subject to conditions. These conditions in brief included that the Commonwealth and ADEs;

- transition from BSWAT to the SWS or an alternative tool approved by the Fair Work Commission (FWC), ensuring no disadvantage is suffered by employees
- to ensure new wage assessments by ADEs use the SWS or an alternative tool approved by FWC (other than BSWAT);
- and that the Commonwealth report to the Commission on a quarterly basis during the exemption period on the number of assessments conducted and the number of assessments still to be conducted

The Commission supported its decision with the following points.

- Some time is needed to enable transition to another tool.
- The information provided to the Commission on the viability of ADEs was limited and anecdotal.
- ADEs are not required to use BSWAT to be compliant with the Disability Service Standards, and that compliance could be achieved through use of the SWS or possibly other tools.
- That non-employment services provided by ADEs should not come at the expense of receiving a wage employees are entitled to.
- An exemption would allow discrimination to continue and it is important to ensure terms of the exemption minimise the discriminatory impact.
- The SWS should be preferred at least as an interim measure, as it is already used in both open and supported employment.

The Commission concluded that an exemption of three years was not reasonable given that discrimination is ongoing and that an alternative wage tool is able to be used immediately. The Commission, however, concluded that a one year exemption was reasonable given the complexity of financial circumstances of ADEs, the nature of services provided, and the number of assessments to be conducted. The Commission also concluded that the exemption only applied to those ADE employees who already had a BSWAT assessment and that the exemption did not apply to new BSWAT assessments.

An interim exemption of an additional four months from 29 April 2015 was granted by the Commission without consultation with employees with disability and their representative organisations.

A further twelve month exemption has been sought by the Commonwealth.

The Commonwealth continues to deny and support the ongoing discrimination

On 21 December 2012, the Full Court of the Federal Court in *Nojin v Commonwealth of Australia [2012] FCAFC 192* concluded that the Business Services Wage Assessment Tool was not reasonable. Buchanan J states;

> "139. Fourthly, part of the reason why, in my view, use of BSWAT is not reasonable is because it is discriminatory in the wider and less technical sense of the term so far as intellectually disabled workers are concerned. Such persons make up the bulk of workers in ADEs. As a class of people they have had imposed on them a tool to measure their work contribution, compared to that of a Grade 1 worker, which does not measure like for like and which subjects them to a disadvantage. The likely result in most cases, and the actual result for Mr Nojin and Mr Prior, is a calculation which understates their actual contribution relative to the work for which the Grade 1 rate of pay is fixed. Understatement of the value of the actual work contribution of an intellectually disabled worker is, in my respectful view, neither necessary nor reasonable."

In the Court's conclusions Buchanan J states:

> "141. I accept that BSWAT is skewed against intellectually disabled workers. The preponderance of the evidence was to that effect. The findings of the trial judge are to that effect. That feature of BSWAT has the consequence, in my view, that intellectually disabled workers are disadvantaged by comparison with other disabled workers.
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> 142. In my view, the criticism of BSWAT is compelling. I can see no answer to the proposition that an assessment which commences with an entry level wage, set at the absolute minimum, and then discounts that wage further by reference to the competency aspects built into BSWAT, is theoretical and artificial. In practice, on the evidence, those elements of BSWAT have the effect of discounting even more severely, than would otherwise be the

case, the remuneration of intellectually disabled workers to whom the tool is applied. The result is that such persons generally suffer not only the difficulty that they cannot match the output expected of a Grade 1 worker in the routine tasks assigned to them, but their contribution is discounted further because they are unable, because of their intellectual disability, to articulate concepts in response to a theoretical construct borrowed from training standards which have no application to them . . . "

The Court's decision is clear that BSWAT disadvantages workers with intellectual disability as a class of people and is unlawful under the Disability Discrimination Act 1992.

The High Court of Australia agreed with the Full Court of the Federal Court when it dismissed an application by the Commonwealth to seek leave to appeal. Crennan J stated;

"The Full Court of the Federal Court, by a majority, concluded that the use of the BSWAT disadvantaged intellectually disabled persons. Although it was widely used, it was not reasonable. One component of the BSWAT involves the assessment of a person's competencies in the workplace. The unchallenged expert evidence was that the BSWAT produced a differential effect for intellectually disabled persons and reduced their score. We see no reason to doubt the conclusions of the Full Court." (M12 & M13 of 2013.)

Despite the rulings of the Full Federal Court and the High Court of Australia, the Commonwealth and ADEs that are still using BSWAT, continue to deny that BSWAT discriminates against workers with intellectual disability.

The Commonwealth Assistant Minister, Senator Mitch Fifield, wrote to the Parliamentary Joint Committee on Human Rights, stating;

"Assessments of wages under the BSWAT generally resulted in a reasonably accurate measure or assessment of the actual capacity of the individuals to perform the requirements of their employment and produced

adequate and fair remuneration." (Parliamentary Joint Committee on Human Rights, Eleventh Report of the 44th Parliament, September 2014).

This is a statement by Senator Fifield which is in direct conflict with the findings of the Courts.

The Commonwealth has also communicated to all workers with intellectual disability of the Commonwealth's belief that BSWAT is a fair wage assessment. The opt-out notice, a federal court document of the class-action being brought on behalf of workers with intellectual disability, states;

"The Government has told the Court that they think:

- The BSWAT tool was a fair way of working out wages for people with intellectual disability working at ADEs.
- It was not disability discrimination."

This statement to workers with intellectual disability is accompanied by an image of Parliament House with "BSWAT" captured in a box next to a large tick.

The Commonwealth government and ADEs, two and half years after the Full Federal Court decision, and two years after the High Court decision, still do not accept that BSWAT discriminates against workers with intellectual disability under the Disability Discrimination Act 1992.

There is no apology, statement of regret, or offer of compensation from the Commonwealth to workers with intellectual disability who have been paid, or still being paid, through an assessment by BSWAT.

The application by the Commonwealth, and ADEs using BSWAT, is not made in good faith. There is no acceptance of the discrimination that workers with intellectual disability have or are continuing to suffer due to BSWAT.

Why would the Commission grant an exemption from the DDA when the applicant — the Commonwealth and ADEs using BSWAT - do not accept that BSWAT is unlawful.

The application is therefore disingenuous. If there is no discrimination then there is no need to seek or provide an exemption from the DDA. Let workers with intellectual disability and their families keep their rights under the DDA and their right to complain if they so choose.

The Commonwealth continues to delay the rights of people with intellectual disability

It is now two and half years since the Nojin v Commonwealth case was decided by the Full Court of the Federal Court. It is two years since the High Court of Australia confirmed the Federal Court's decision.

If a further twelve months exemption is granted then people with intellectual disability have been subject to disability discrimination for three to three and half years.

This continual delay to redress discrimination, with no admission of discrimination, or commitment to resolve this quickly, suggests that a further twelve months exemption is simply delay for delay sake.

There is no transparent or rigorous plan from the Commonwealth or ADEs on how this discrimination will be systematically resolved.

In the previous twelve month exemption period granted by the Commission, the lack of information provided by the required quarterly reports has been contemptible.

Each quarterly report should have listed each ADE using BSWAT at the time the exemption was granted. Against each ADE should have been listed the numbers of employees receiving a wage based on BSWAT as at 29 April 2014, and the number for each quarter that had moved to SWS or a specified approved wage assessment tool. Each ADE should have reported what their

plans, actions and timelines were to meet the conditions of the temporary exemption.

On 13 October 2014, national peak disability and advocacy organisations wrote to the Commission raising concerns about the inadequacy of the quarterly reports submitted by the Commonwealth and relevant ADEs.

Following our concerns, the Commission requested that the Commonwealth ensure that it report on the actual number of workers changing from BSWAT to SWS or an approved tool. This request was made by the Commission in December 2014, eight months into the 12-month temporary exemption.

Whereas the third quarterly report was an improvement, the reporting still contains significant problems to demonstrate compliance with the Commission's conditions.

1. The reported communication strategy of email news bulletins and NDS forums is not an *active* step to transition from BSWAT to the SWS or an alternative tool.
2. Whereas we welcome the Commonwealth's announcement of $173 million to develop and implement a new productivity-based wage tool and assist ADEs meet higher wage costs, there is no evidence of a commitment by ADEs to implement a valid productivity-based wage tool. Without such a commitment, the budget announcement is not an *active* step by ADEs to move from BSWAT to the SWS or an approved tool. It should be noted that there is already a valid productivity based wage assessment tool being used successfully by open employment employers AND by ADEs. ADEs using BSWAT can move to the SWS right now. Those ADEs that did move to the SWS is an *active* step.
3. The suspension of BSWAT assessments from 24 December 2013 is not an *active* step by ADEs to transition from BSWAT to the SWS or an approved tool. The Commission's exemption condition is about the

transition of employees who had a current BSWAT assessment on April 29, 2014 to change to the SWS or an approved tool by April 29 2015.

4. We already know that there are many different wage assessment tools listed under the relevant Award and that the Commonwealth only administers the Supported Wage System. This is already known. This not an *active* step by ADEs to transition from BSWAT to the SWS or an approved tool.
5. The reporting by DSS Grant Managers of ADE transition to the SWS or an approved tool is a good process to collect information, but it is not an *active* step by ADEs to transition to the SWS or an approved tool.

We acknowledge those ADEs who have transitioned to the Supported Wage System within the 12 month exemption period. This upholds the dignity and right of workers with intellectual disability to be paid on a fair basis without discrimination.

We do recognise those ADEs who have transitioned to an approved wage assessment tool under the SESA award within the 12 month exemption period. It should be noted, however, that it is our view that the “approved wage assessment tools” suffer from the same defect contained in BSWAT (i.e. competency based wage assessment) as identified by the Full Federal Court in *Nojin v Commonwealth*. Whereas such a transition meets the conditions of the temporary exemption, our view is that the “approved” wage assessment tools listed in the SESA, except the Supported Wage System, are discriminatory.

As noted by Katzmann J (in Nojin v Commonwealth at [267]) the use of a wage assessment tool in direct compliance with an Award is not sufficient to establish reasonableness under the DDA.

It was stated in the third quarterly report that an increase in wage costs was a barrier to moving to the SWS. Yet the 3rd quarterly report stated that, “Tapering wage supplementation is in place from 1 February 2015 for

organisations that have moved to the Supported Wage System (or to the new productivity-based tool, when available). This funding assistance was announced on 21 August 2014. An increase in wage costs is therefore not a barrier to moving to the SWS.

It is particularly concerning that a further twelve month exemption is being sought for time to implement the SkillsMaster and Greenacres wage assessment tools. As noted above, these wage tools contain the same defect of competency based assessment considered unlawful by the Full Federal Court.

Complaints about discrimination in employment from workers and their families with respect to the SkillsMaster and Greenacres wage assessment that have been lodged with the Commission.

The granting of a further exemption for employees to continue to be paid BSWAT-based wages so that ADEs can have more time to transition employees to other wage assessment tools that contain the same defect as BSWAT is an unacceptable use of the DDA exemption provisions, and fails to provide a solution which uphold the rights of workers with intellectual disability.

The Commonwealth and ADEs continue to deceive and frighten workers with intellectual disability and their families

It has been disappointing that the Commonwealth and some ADEs have used fear and scaremongering to justify the continued discrimination of workers with intellectual disability.

Many workers with intellectual disability and their families struggle to understand their rights to a fair award based wage and are subject to the influence and competing interests of ADE organisations.

It is not surprising that many workers and their families — due to wild claims about job losses — are fearful that fair wages will result in the loss of jobs or the closure of ADEs.

In our view, it is irresponsible for the Commonwealth and some ADEs to garner support from workers with intellectual disability for ongoing discrimination by threatening their job security. As noted by Buchanan J (at [132] Nojin v Commonwealth), business viability should not be achieved at the price of a "comparative disadvantage on the intellectually disabled."

Fair wages and business viability are not incompatible in the ADE sector. A number of ADEs using SWS have demonstrated that business viability is possible. ADEs that use SWS vary in size, type of business, type of disability of employees, and hours of work. The 2015 ADE excellence award was won by *On Track* from Tweed Heads which uses the SWS. On Track reported that:

> "The award recognises On Tracks new and innovative practices supportive of the development of high quality and sustainable employment, whilst providing premium employment conditions to our employees with disability. It acknowledges that we provide best practice and innovative training opportunities; achieve strong wage outcomes; provide safe working conditions, social inclusion and participation for the employees; and quality of service to people with disability." (Source: http://www.otcp.com.au/on-track-awarded-best-ade-in-australia/).

ADE sustainability does not have to be achieved via workers with disability being paid less than what they are entitled to.

Inclusion Australia,and AED Legal Centre, together with other national peak disability and advocacy organisations, recommended in our previous submission to the Commission, that the Commonwealth should assist ADEs unable to meet the increase in wage costs. We were pleased that the Commonwealth announced in August 2014 that $141million had been budgeted to assist with increased wages. We were also pleased that the Federal Budget 2015 announced an additional $17 million to help improve the viability of ADEs.

Inclusion Australia and AED Legal Centre acknowledges that there are mixed views about fair wages in ADEs from both workers and their families. These views range from a position of dismissing wages as not important to workers with intellectual disability, to a position that workers with intellectual disability have the right to a fair award wage the same as other Australian.

The position of Inclusion Australia and AED Legal Centre is that fair award wages and a fair pro-rata award wage assessment is a fundamental right of all workers and a fundamental responsibility of all employers. Business sustainability is not something that is permitted to be achieved by sacrificing the basic rights of a worker with intellectual disability. Inclusion Australia and AED Legal Centre— together with other disability consumer organisations — argued in our previous submission that if business viability was threatened by change to fair wages that the Commonwealth should assist financially to enable transition to occur without loss of jobs. We were pleased that the Commonwealth took up our recommendation. It is however the responsibility of the ADE sector to operate a viable business, capable of meeting fair award based wages, without discriminating against workers with intellectual disability.

Recommendation

Inclusion Australian and AED Legal Centre recommend that the Commission reject the application from DSS to grant a further temporary exemption of twelve months. An exemption would enable employers to unnecessarily continue to discriminate against thousands of people with intellectual disability. Employers have access to a fair productivity based wage assessment tool (i.e. the Supported Wage System) and access to Commonwealth budgeted funding to assist with increases in wage cost to address business viability.